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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-456

IN THE MATTER OF: BEHRING AND BEHRING,
A PARTNERSHIP, et al.,
BANKRUPT,

JOE C. HUMPHREYS, TRUSTEE,
Petitioner,

v.

NISSHO AMERICAN CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, Nissho American Corporation, respectfully submits this Brief in opposition to Petitioner's Application for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and prays that said Petition be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

The Court of Appeals for the Fifth Circuit, in affirming the decision of the United States District Court for the Northern District of Texas, Dallas Division, held that the Trustee's counterclaim in the present case was not a compulsory one within the meaning of Rule 13(a) of the Federal Rules of Civil Procedure. In so holding, both lower courts found that the subject matter of the counterclaim was not so inextricably interwoven with the subject matter of Respondent's claim as to be brought under the summary jursidiction of the Bankruptcy Court. This finding was, in turn, based on the further finding that it was not necessary to consider the Trustee's counterclaim in order to "allow", "disallow", or "reconsider" Respondent's claim within the meaning of Section 2a(2) of the Bankruptcy Act, 11 U.S.C.A. § 11(a)(2). This *factual* determination by both of the lower courts is fully supported by the evidence which they considered, and presents no question which merits this Court's consideration.

While Petitioner argues that the lower courts' finding that the Trustee's counterclaim is not compulsory is too restrictive and in conflict with prior decisions of this Court and the decisions of several other circuit courts, he cites no cases in point which create the alleged conflict. None of the cases cited are bankruptcy cases, and General Order in Bankruptcy No. 37, 11 U.S.C.A. following § 53, provides:

> In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, *in so far as they are not inconsistent with the Act* or with these general orders, be followed as nearly as may be. . . . [Emphasis added].

The case of *John R. Alley & Co., Inc. v. Federal National Bank of Shawnee County, Oklahoma*, 124 F.2d 995 (10th Cir.

1942), which is cited by Petitioner, although not a bankruptcy case, did involve a counterclaim for usury. This case, which was relied on by the Referee in Bankruptcy in making his determination that the Trustee's counterclaim was compulsory, was easily distinguished by the Court of Appeals for the Fifth Circuit in its opinion (see Page A-25 of Appendix to Petitioner's Petition for a Writ of Certiorari) and by the District Court in its opinion (see Page A-17 of Appendix to Petitioner's Petition for a Writ of Certiorari).

Petitioner has cited no decision of this Court or any of the circuit courts which holds that a permissive counterclaim not involving the determination of a preference under §57(g) of the Bankruptcy Act,11 U.S.C.A. §93(g), is within the summary jurisdiction of the Bankruptcy Court. It is therefore apparent that the decisions of the lower courts in this case do not conflict with any decision of the other circuit courts or of this Court and that the case meets none of the criteria of Rule 19, Rules of the Supreme Court of the United States, 28 U.S.C.A. for the granting of a writ of certiorari.

The thrust of Petitioner's argument is (1) that the Trustee's counterclaim is subject to set-off, under the provisions of §68 of the Bankruptcy Act, 11 U.S.C.A. §108, against any dividend which may be payable to Respondent on its claim filed in the Bankruptcy Court; (2) that the Bankruptcy Court can therefore determine the merits of the counterclaim for defensive purposes; (3) that once having determined the merits of the counterclaim for defensive purposes, that determination would be *res judicata* in any plenary action, so (4) the Trustee should be granted an affirmative judgment on the counterclaim.

The defects in Petitioner's argument are numerous. Of controlling importance is the fact that the Trustee's counterclaim is *not* subject to set-off against Respondent's claim or any

dividend which may be payable to Respondent upon its claim in the Bankruptcy Court. This Court's holding in *McCollum v. Hamilton National Bank of Chattanooga*, 303 U.S. 245 (1938) at 248-49, dictates this result:

> Section 68a declares: 'In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.' The words 'debts' and 'credits' as there used are correlative. What is a debt on one side is a credit on the other. [citation omitted] Liability for the penalty [for collection of usurious interest] does not arise in contract but is laid in invitum as a disciplinary measure. Nor does the judgment determining the extent of guilt and declaring sentence change the liability for penalty to one for debt.
>
> * * *
>
> It follows that respondent is not entitled to satisfy petitioner's judgment [for the penalty for the collection of usurious interest] by deducting the amount of it from respondent's claim against the bankrupt's estate.

It is therefore clear under this decision that any recovery by the Trustee of the penalty for collection of usurious interest would not be subject to set-off against the claim of Respondent, or any dividends which it might receive based on that claim. This is simply not one of the appropriate cases for the application of the doctrine of set-off under § 68. As this Court further explained in *Cumberland Glass Mfg. Co. v. DeWitt*, 237 U.S. 447 (1915) at 454-55:

> The object of this provision [§ 68] is to permit, as its terms declare, the statement of the account between the bankrupt and the creditor, with a view to the application of the doctrine of set-off between mutual

> debts and credits. The provision is permissive rather than mandatory, and does not enlarge the doctrine of set-off, and cannot be invoked in cases where the general principles of set-off would not justify it. [citations omitted]
>
> * * *
>
> Mutual debts do not, indeed, properly constitute cross claims by the civil law, for they extinguish each other *ipso jure*, and the party alone in whose favor the balance is has a claim which can be enforced by action, and his claim is only to the extent of such balance.

Petitioner quotes from *Collier on Bankruptcy*, Vol. 4 at pages 951 and 946 to support his argument that permissive counterclaims should be subject to the summary jurisdiction of the Bankruptcy Court, if only for defensive purposes. If the statements which Petitioner quotes are examined in the context of the surrounding analysis, it is apparent that the author is referring to claims which by their nature would be properly subject to set-off under §68. Since the Trustee's counterclaim in the present case is not such a claim, the analysis relied upon is not appropriate. Additionally, and more directly on the point, the author observes in *Collier on Bankruptcy*, Vol. 4 at pages 946-47:

> But where the trustee attempts to obtain, by virtue of a set-off or counterclaim, a judgment for a balance against the plaintiff, or other affirmative relief, the problem becomes twofold: (1) does the bankruptcy court have power to grant an affirmative judgment in summary proceedings; (2) has the plaintiff, by filing his petition or otherwise, consented to the exercise of such jurisdiction? It appears agreed that a bankruptcy court does not have the jurisdiction to render such a general judgment in favor of the bankrupt estate

> without consent; but as to the character of the plaintiff's consent there is some lack of unanimity.
>
> * * *
>
> [T]he mere filing of a proof claim for allowance is not such a clear expression of consent.

Since the Trustee's counterclaim in the present case is not one which is subject to set-off against Respondent's claim and does not involve a preference, voidable lien, or fraudulent transfer of property, it does not meet the criteria established in the decision of the Court of Appeals for the Tenth Circuit in *Katchen v. Landy*, 336 F.2d 535 (10th Cir. 1964) or the other cases reviewed in footnote 1 to this Court's decision in *Katchen v. Landy*, 382 U.S. 323 (1966), 326-27, for the determination of the claim pursuant to the summary jurisdiction of the Bankruptcy Court.

If this Court were to accept Petitioner's reasoning for subjecting the determination of the Trustee's counterclaim to the summary jurisdiction of the Bankruptcy Court, there would be no limit to the type of matters which would thus be subject to summary disposition in the Bankruptcy Court. Any claim which the bankrupt may have against a creditor on a matter wholly unrelated to the proof of claim filed by the creditor may in some sense be considered a defense to the creditor's claim. If the Trustee were ultimately to prevail on that claim, the resulting judgment might provide a defense or off-set to all or part of the creditor's claim in the sense that it would constitute a credit against the claim. The possibility of this result, however, does not justify subjecting the creditor to a summary

adjudication of any claim which the Trustee may have against him, with the attendant loss of the traditional safeguards of a plenary suit, including the right to trial by jury and the other protections afforded by the Federal Rules of Civil Procedure. This Court has held that a creditor may be deprived of these safeguards and have a counterclaim against it determined within the summary jurisdiction of the Bankruptcy Court where the same is necessary as part of the allowance or disallowance of its claim against the bankrupt. *Katchen v. Landy*, 382 U.S. 323, 329. The lower courts in the present suit have followed this Court's clear directions contained in *Katchen v. Landy* and have held that the Trustee's counterclaim is not compulsory within the meaning of Rule 13(a) of the Federal Rules of Civil Procedure and that it is not necessary to consider the merits of said counterclaim to allow or disallow Respondent's claim in the Bankruptcy Court. There being no express consent by Respondent to the Bankruptcy Court's exercise of summary jurisdiction over the Trustee's counterclaim, the Court of Appeals for the Fifth Circuit and the United States District Court for the Northern District of Texas, Dallas Division, have correctly held that there is no basis for holding that the Bankruptcy Court has authority to entertain summary jurisdiction over the Trustee's counterclaim in this case.

CONCLUSION

The decisions of the lower courts in this case are consistent with the decisions of this Court and of other courts in the Federal system on this question and present no matter which requires a determination by this Court. Accordingly, Respondent urges that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE

This is to certify that a copy of Brief of Respondent in Opposition was this, the 23rd day of October, 1971, served upon Rochelle and King by mailing the same to them at 1200 Republic National Bank Building, Dallas, Texas, 75201.

ORIGINAL SIGNED BY
W. RANDOLPH ELLIOTT

W. Randolph Elliott